

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of)  
PU'UIWAIWA, LLC )  
For a Declaratory Ruling. )  
\_\_\_\_\_ )

DOCKET NO. 2007-0303

ORDER NO. 23697

DIY. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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Filed October 4, 2007  
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Barbara K. Kane  
for Chief Clerk of the Commission

ATTEST: A True Copy  
for KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Barbara K. Kane

In the Matter of the Petition of)  
                                   PU'UIWAIWA, LLC                                  )  
   )  
 For a Declaratory Ruling.  )

Order No. 23697

HRS § 269-7.5 (d) .

instructed to submit for the commission's review and consideration a stipulated prehearing order by October 29, 2007, provided that if the Parties are unable to agree on a joint prehearing order, each party shall submit its own proposal by the same date. By this action, the commission declines to issue a declaratory order within forty-five days following the filing of the Petition, and instead, sets this matter for a hearing, following the completion of the pre-hearing process.

I.

Background

A.

Petition

On August 29, 2007, Petitioner filed its Petition for Declaratory Ruling.<sup>2</sup>

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<sup>2</sup>Petition for Declaratory Ruling and Memorandum in Support; Exhibits A - C; Verification; Consent in Writing of the Managing Member of Pu'uiwaiwa, LLC; and Certificate of Service, filed on August 29, 2007 (collectively, "Petition"). Petitioner: (1) filed its Petition pursuant to HAR chapter 6-61, subchapter 16, governing declaratory orders; and (2) served copies of its Petition upon the Consumer Advocate and WHWC.

Previously, on June 25, 2007, Petitioner filed a similar petition for declaratory ruling, in In re Pu'uiwaiwa, LLC, Docket No. 2007-0171. On July 20, 2007, the commission dismissed the petition without prejudice, based on Petitioner's lack of service of its petition upon WHWC, the affected public utility, pursuant to HAR §§ 6-61-161(5) and 6-61-163. In re Pu'uiwaiwa, LLC, Docket No. 2007-0171, Order No. 23556, filed on July 20, 2007. On August 29, 2007, Petitioner re-filed its Petition in the present proceeding (Docket No. 2007-0303), with certain revisions, and served copies upon WHWC, in compliance with HAR § 6-61-161(5).

Petitioner, in its Petition, represents:

1. Petitioner, Kilauea Trust I, and Waimea Limited Partnership (collectively, "Land Owners"), are the owners of six parcels of land, consisting of approximately 4,200 acres, within WHWC's service territory. The Land Owners plan to utilize the parcels of land as agricultural lots.

2. The Land Owners submitted a request for water service to WHWC. In response, WHWC informed the Land Owners that: (A) WHWC only has potable water available; and (B) subject to the system-wide availability of water and pursuant to certain terms and conditions, WHWC has the capacity to provide water service to the Land Owners. As a courtesy, WHWC also provided the Land Owners with an estimated amount of the contribution-in-aid-of-construction ("CIAC") fee the Land Owners will have to pay to WHWC as a condition of receiving water service.

3. The estimated amount of the CIAC fee, together with the off-site water system construction costs, are cost prohibitive to the Land Owners and have forced them to look at other alternatives.

4. One option is for the Land Owners to develop their own private, non-potable water system on one of the parcels of land that is jointly owned by Kilauea Trust I and Waimea Limited Partnership. The proposed private water system will be owned by the Land Owners and only be used to provide water for fire protection, stock water for limited livestock grazing in the pastures, planting and growing native trees, and low intensity

agricultural uses to the Land Owners' land. Potable water demand will be met with bottled water.

5. "In the future the Land Owners may further subdivide the parcels into 47 large agricultural lots and sell some of the lots. At that time, the Land Owners will turnover the private water system to a Water Association whose members would all be lot owners within the 47 lots. Ownership within the subdivided 47 lots will require membership in the Water Association."<sup>3</sup> "The Water Association, a non-profit corporation, will own and operate the Water System for the sole use of its members that control the Water Association. At no time, will water from the Water System be supplied to the public, as a class, or to any limited portion of it. The Water System will only serve members of the Water Association."<sup>4</sup>

6. "Land Owners are unaware of any law or rules that would prohibit them from developing their own private water system to serve themselves . . . . Additionally, the Land Owners only want non-potable water for fire protection, stock water for limited grazing in the pastures, planting and growing native trees, and low intensity agricultural use. WHWC is only able to provide the Land Owners with potable water at an excessive cost. Thus, if the Land Owners are required to take water from WHWC they would be forced to take potable water and use that water for traditional non-potable uses. This would be against public

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<sup>3</sup>Petition, at 5.

<sup>4</sup>Petition, at 9-10 (footnotes and citations therein omitted).

policy to use good potable water for traditional non-potable uses, when the Land Owners can meet this need with a private non-potable system. Accordingly, [it is] Petitioner's position that it . . . may develop its own private water system within WHWC's service territory."<sup>5</sup>

Based on the foregoing information, Petitioner requests that "a declaratory order be issued stating that it may develop its own private water system within WHWC's service territory and that since the Land Owners' water system will only serve its owners; i.e. Petitioner, Land Owners, or members of the Water Association, the [Land Owners' private, non-potable] Water System is not a public utility and is not subject to the Commission's jurisdiction."<sup>6</sup>

B.

WHWC's Motion to Intervene

On September 18, 2007, WHWC filed its Motion to Intervene. In seeking to intervene, WHWC asserts:

1. WHWC is a Hawaii corporation and a public utility operation regulated by the commission.

2. The property upon which the Land Owners seek to establish their de facto public water system is within WHWC's service territory. If the Land Owners are not allowed to establish a de facto public water system, they will likely seek WHWC's services and become a part of WHWC's ratepayer base. In

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<sup>5</sup>Petition, at 5-6.

<sup>6</sup>Petition, at 9-10.

addition, "WHWC owns the water rights on most of the property of the Land Owners' proposed system, and this is an attempt to circumvent WHWC's water rights."<sup>7</sup>

3. If the Land Owners are allowed to establish a de facto public water system, such action will set a harmful and dangerous precedent for others to seek to establish their own public water system within WHWC's service area. Moreover, this will effectively undermine the concept of a service territory and may harm the public, as these de facto public water systems will not be subject to the commission's regulation.

4. WHWC is unaware of any other means available to it where it can effectively protect its interests, including the potential loss of a ratepayer base and revenues that could otherwise be used to improve and expand upon WHWC's utility services.

5. The Consumer Advocate represents the public's interest and is unable to represent WHWC's private property and financial interests, and the Land Owners' interests are in direct conflict with WHWC's interests.

6. WHWC's participation in this proceeding can assist the commission in developing a sound record, and will not broaden the issues or delay the proceeding.

7. WHWC opposes the Land Owners' proposed establishment of a de facto public water system within its service territory, based on certain reasons, including:

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<sup>7</sup>WHWC's Motion to Intervene, at 2-3.

. . . . as the Land Owners admit, WHWC is ready, willing, and able to provide water service to the Land Owners' property and as such, WHWC has an exclusive service territory. Cf. Cities of Oxford, et al. v. Northeast Mississippi Electric Power Assoc., 704 So.2d 59, 68 (1997) (holding that a certificate of public convenience and necessity to operate is an exclusive right to operate in a designated area where the utility is capable of rendering service to the public located in the area). This is not, as the Land Owners would have the Commission believe, like a "public utility customer who decides to be off the grid and not to take power from the electric public utility." See Petition, p.6. The Land Owners are proposing to create a water system covering more than 4,000 acres, serving at least 47 lots, and 47 residences. The Land Owners would take away a large piece of WHWC's service area, in which WHWC has invested tens of millions of dollars in wells, tanks, and other infrastructure. The Land Owners' Petition would set a dangerous precedent, and deprive WHWC of revenues and the opportunity to earn a fair return on its substantial investment . . . .

WHWC's Motion to Intervene, at 4-5; see also id., at 1-2 (upon close examination, the Land Owners intend to distribute water for residential use).

WHWC concludes by seeking "to conduct discovery and have an evidentiary hearing on the extent to which the Land Owners' potential water system constitutes a de facto public water system which infringes upon WHWC's exclusive service area."<sup>8</sup>

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<sup>8</sup>WHWC's Motion to Intervene, at 5-6.



C.

Petitioner's Response

On September 25, 2007, Petitioner filed a Memorandum in Opposition to WHWC's Motion to Intervene.<sup>9</sup> In opposing WHWC's intervention, Petitioner asserts:

1. WHWC has no statutory or other mandatory right that automatically entitles WHWC to intervene in this proceeding.

2. WHWC fails to provide any basis for its alleged property, financial, and other interests. WHWC erroneously refers to the Land Owners' proposed private water system as a de facto public water system. Moreover, "it is **unlikely** that the Land Owners will seek WHWC's services and become a part of WHWC's ratepayer base; it is simply not a viable option."<sup>10</sup> In addition, the State of Hawaii, Department of Land and Natural Resources, has approved and issued to Petitioner two well permits that authorize the Land Owners to begin well construction activities.

3. WHWC fails to demonstrate that the pending order addressing its motion will have any effect on its interests. The Land Owners' proposed private water system will "only be used to provide water for fire protection, stock water for limited

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<sup>9</sup>Petitioner's Memorandum in Opposition to WHWC's Motion to Intervene; Certificate of Service; and Exhibits A - B, filed on September 25, 2007 (collectively, "Memorandum in Opposition"). In its Memorandum in Opposition, Petitioner states that it has recently changed its name to Pu'uiwaiwa Ranch, LP. See id. at 1 n.1. Moreover, while the case caption on the cover page of the Memorandum in Opposition inadvertently references a different docket number (Docket No. 05-0145), the case caption on the first page correctly references Docket No. 2007-0303.

<sup>10</sup>Petitioner's Memorandum in Opposition, at 4 (boldface in original).

livestock grazing in the pastures, planting and low intensity agricultural uses to the Land Owners' land. Demand for potable water will be met with bottled water."<sup>11</sup> Moreover, the Land Owners are in the process of subdividing their lots, no water is needed to subdivide the lots, and WHWC "has made no investments for infrastructure to provide water to potential customers to over 10,000 acres of its mauka service territory (which includes Land Owners' parcels)."<sup>12</sup> In effect, WHWC will not serve the Land Owners unless they pay an estimated CIAC fee and off-site construction cost of \$17 million. This option is not economical or viable to the Land Owners.

In addition, this proceeding "is not about another public utility coming into the service territory of a public utility[,]" as characterized by WHWC.<sup>13</sup> Rather, the Land Owners' proposal involves a private water system that, in Petitioner's view, will not be subject to the commission's regulation as a public utility. Thus, WHWC's reference to its exclusive service territory is neither germane nor pertinent.

4. WHWC has not shown that its participation will assist in developing a sound record. Instead, WHWC's intervention will broaden the issues and unduly delay this proceeding. "This is especially true, since WHWC specifically 'proposes to conduct discovery and have an evidentiary hearing on the extent to which the Land Owners' potential water system

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<sup>11</sup>Petitioner's Memorandum in Opposition, at 5.

<sup>12</sup>Petitioner's Memorandum in Opposition, at 5-6.

<sup>13</sup>Petitioner's Memorandum in Opposition, at 7.

constitutes a de facto public water system which infringes upon WHWC's exclusive service area.' These are not the issues outlined in the Petition."<sup>14</sup>

5. The "just, speedy, and inexpensive determination" of this proceeding cannot be accomplished if the commission admits every movant as a party.

## II.

### Discussion

The standard for granting intervention is set forth in HAR § 6-61-55, which requires the movant to state the facts and reasons for the proposed intervention, and its position and interest thereto. HAR § 6-61-55 provides:

§6-61-55 Intervention. (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

(b) The motion shall make reference to:

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;

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<sup>14</sup>Petitioner's Memorandum in Opposition, at 8.

- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

(c) The motion shall be filed and served by the applicant in accordance with sections 6-61-21 and 6-61-57.

(d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

HAR § 6-61-55. Moreover, intervention "is not a matter of right but a matter resting within the sound discretion of the commission." In re Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

HAR chapter 6-61, subchapter 16, governs declaratory orders issued by the commission. HAR §§ 6-61-159, 6-61-161, 6-61-162, 6-61-165, and 6-61-166 state in relevant part:

§6-61-159 Who may apply. On the petition of an interested person, the commission may issue a declaratory order as to the applicability of any statute or any rule or order of the commission.

§6-61-161 Form and contents. A petition for declaratory order must conform to the requirements of subchapter 2 and contain the following:

. . . . .

(5) Proof of service on the affected public utility, motor carrier, or water carrier and on the consumer advocate.

§6-61-162 Commission action. (a) Within forty-five days after the submission of a petition for declaratory ruling, the commission shall:

- (1) Deny the petition in writing, stating the reasons for that denial;
- (2) Issue a declaratory order on the matters contained in the petition; or
- (3) Set the matter for hearing, as provided in subchapter 3.

(b) If the matter is set for hearing, the commission shall render its findings and decision, unless otherwise indicated at the time of the hearing, within thirty days after the close of the hearing or, if briefs are filed, thirty days after the last brief is filed.

§6-61-165 Request for hearing. Although in the usual course of disposition of a petition for a declaratory ruling no formal hearing will be held, the commission may order a hearing. Any petitioner or party in interest who requests a hearing shall state the reasons why a hearing is necessary and, to the extent that the request for a hearing is based upon factual assertion, shall attach an affidavit establishing the facts. If the commission orders a hearing, the provisions of subchapter 3 shall govern the proceeding.

§6-61-166 Applicability of order. An order disposing of a petition for a declaratory order applies only to the factual situation described in the petition or if, a hearing is held, as set forth in the decision and order.

HAR §§ 6-61-159, 6-61-161, 6-61-162, 6-61-165, and 6-61-166.

Petitioner served copies of its Petition upon WHWC, the affected public utility under HAR § 6-61-161(5). WHWC, in turn, seeks to intervene in this proceeding, pursuant to HAR § 6-61-55.

Petitioner asserts that the Land Owners may establish and develop a private water system within WHWC's service territory. WHWC, by contrast, "opposes the Land Owners' proposed establishment of a de facto public water system within WHWC's service territory[,]" intimating that it has the exclusive right to provide water service within its service territory.<sup>15</sup>

Here, the commission finds that WHWC, as the affected public utility in this instance, has a direct interest in this proceeding that will not be represented by the existing parties, and its participation should assist the commission in developing a sound docket record. Accordingly, the commission grants WHWC's Motion to Intervene, subject to the conditions noted below.

WHWC is expressly cautioned that its participation as an intervenor in this docket will be limited to the issues raised in this proceeding. The commission will preclude any effort by WHWC to unreasonably broaden the issues, or unduly delay the proceeding, and will reconsider its participation in this docket if, at any time during the course of this proceeding, the commission determines that WHWC is unreasonably broadening the pertinent issues raised or unduly delaying the proceeding.

The Parties shall submit for the commission's review and consideration a stipulated prehearing order by October 29, 2007, provided that if the Parties are unable to agree on a joint prehearing order, each party shall submit its own proposal by the same date. The stipulated prehearing order shall: (1) incorporate the issues raised in this proceeding, as

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<sup>15</sup>WHWC's Motion to Intervene, at 4.

identified on page 2, paragraph 3, of the Petition; and (2) include a hearing, consistent with HAR §§ 6-61-162(a)(3) and 6-61-165, unless a hearing is affirmatively waived by the Parties. Thus, by this action, the commission declines to issue a declaratory order within forty-five days following the filing of the Petition, and instead, sets this matter for a hearing, following the completion of the pre-hearing process.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. WHWC's Motion to Intervene, filed on September 18, 2007, is granted, provided that WHWC shall not unreasonably broaden the issues, or unduly delay the proceeding, and it follows all applicable rules, orders, and other requirements imposed by the commission.


2. By October 29, 2007, the Parties shall submit a stipulated prehearing order, provided that if the Parties are unable to agree on a joint prehearing order, each party shall submit its own proposal by the same date. The stipulated prehearing order shall: (A) incorporate the issues raised in this proceeding; and (B) include a hearing, consistent with HAR §§ 6-61-162(a)(3) and 6-61-165, unless a hearing is affirmatively waived by the Parties.

3. By this action, the commission declines to issue a declaratory order within forty-five days following the filing of

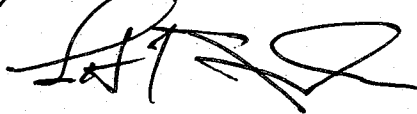
the Petition, and instead, sets this matter for a hearing,  
following the completion of the pre-hearing process.

DONE at Honolulu, Hawaii OCT - 4 2007.


PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
John E. Cole, Commissioner

By   
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

  
Michael Azama  
Commission Counsel

2007-0303.sl



CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 23697 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

SANDRA-ANN Y.H. WONG, ESQ.  
1050 Bishop Street #514  
Honolulu, HI 96813

Counsel for PU'UIWAIWA, LLC

ROGER A. HARRIS  
PU'UIWAIWA, LLC  
P. O. Box 803  
Kamuela, HI 96743

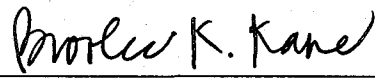
JEFF PARKER  
KILAUEA TRUST I AND WAIMEA LIMITED PARTNERSHIP  
1801 White Hawk Court  
Las Vegas, NV 89134

BRUCE MOORE  
DEVELOPMENT MANAGER  
WEST HAWAII WATER COMPANY  
150 Waikoloa Beach Drive  
Waikoloa, HI 96738-5703

Certificate of Service  
Page 2

BRUCE D. VOSS, ESQ.  
LORI N. TANIGAWA, ESQ.  
BAYS, DEEVER, LUNG, ROSE & HOLMA  
Alii Place, 16<sup>th</sup> Floor  
1099 Alakea Street  
Honolulu, HI 96813

Counsel for WEST HAWAII WATER COMPANY

  
\_\_\_\_\_  
for Karen Higashi

DATED: OCT - 4 2007